

July 1, 2015

Jeff S. Jordan
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Marc E. Elias
Ezra W. Reese
Colin Z. Allred
MElias@perkinscoie.com
D. +1.202.434.1609
F. +1.202.654.9126

Re: MUR 6940

Dear Mr. Jordan:

We write as counsel to Correct the Record ("CTR") and Elizabeth Cohen in her official capacity as Treasurer ("Respondents"), in response to the complaint filed by the Foundation for Accountability and Civic Trust on June 2, 2015 (the "Complaint"). The Complaint is speculative and fails to set forth sufficient facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act") or Commission rules. Accordingly, the Complaint should be dismissed and the Commission should close the file.

Legal Analysis

"The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."¹ Additionally, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true.² The Complaint fails to meet this standard and therefore must be dismissed.

The Complaint makes three allegations: (1) that CTR has made, or is planning to make, illegal in-kind contributions to Secretary Hillary Clinton's presidential campaign, Hillary for America; (2) that CTR does not qualify as a Super PAC and has accepted, or is planning to accept, contributions outside the Act's source and amount limits and restrictions; and (3) that CTR has made, or is planning to make, a false certification to the Commission. All three of these allegations fail to meet the Commission's "reason to believe" standard and therefore must be dismissed.

I. The Complaint Is Entirely Speculative, and CTR's Proposed Activities Are Not a Contribution or an In-Kind Contribution

¹ FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas (Dec. 21, 2000) (emphasis added).

² *Id.*

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The Complaint alleges, based solely on news reports, that CTR has made, or will make, illegal in-kind contributions to Hillary for America because CTR is either (1) a "Super PAC," and is planning to make, or is making, in-kind contributions to a federal candidate, or (2) a "hybrid" PAC that is planning to make, or is making, in-kind contributions in excess of the federal limits from its contribution account.³ Both of these claims are purely speculative and without factual basis, and the Complaint misstates the law as it has been interpreted by the courts and implemented by the Commission.

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Because the Complaint's allegations both concern in-kind contributions, they can be addressed together. First, however, it should be noted that all of the claims in the Complaint are entirely speculative because none of the alleged activity had occurred at the time of the Complaint. News reports containing vague statements and CTR's mere formation are not enough to form the basis of a complaint that will satisfy the Commission's "reason to believe" standard. The Complaint does not "set forth specific facts, which, if proven true, would constitute a violation of the [Act],"⁴ and in fact it could not do so, given that CTR had not raised or spent more than \$1,000 when the Complaint was filed and did not file its Statement of Organization until several days after the Commission received the Complaint.⁵ Regarding complaints filed before any activity has taken place, the Commission has stated that "[w]hile there may be some argument that the Commission may consider a complaint alleging a violation of [the Act] has not, but is about to occur" (citing 52 U.S.C. § 30109(a)(2)), it will not "rely on a complaint, such as [the instant complaint], with nothing more than speculation and hearsay as the basis to investigate an allegedly contemplated violation."⁶ Additionally, the Commission has consistently reiterated that the "reason to believe" standard is a high threshold, noting that it is "higher than the Federal Rules of Civil Procedure standard regarding the sufficiency of a complaint, which allows discovery on virtually every complaint that identifies any potential legal or equitable claim."⁷ Based on this high threshold, the Commission has consistently dismissed complaints that rely solely on news reports and lack specific facts.⁸ Thus, because the Complaint fails to provide any specific facts and is entirely based on unwarranted legal conclusions from asserted facts, it should fail on that basis alone.

Additionally, the Complaint must also fail because it fundamentally misstates the law and Commission regulations concerning contributions and in-kind contributions. The Complaint,

³ See Complaint at 8-9.

⁴ FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas (Dec. 21, 2000).

⁵ See FEC Committee ID: C0054820, Statement of Organization filed June 5, 2015.

⁶ FEC Matter Under Review 5562 (Sinclair Broadcast Group), Statement of Reasons of Commissioners David M. Mason and Bradley A. Smith at n 15 (July 12, 2005).

⁷ FEC Matter Under Review 6094 (American Leadership Project), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II at n 12 (July 8, 2009).

⁸ See, e.g., FEC Matter Under Review 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.); FEC Matter Under Review 5562 (Sinclair Broadcast Group); FEC Matter Under Review 6002 (Freedom's Watch, Inc.); FEC Matter Under Review 6056 (Protect Colorado Jobs, Inc.).

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again based solely on news reports, claims that CTR's "personnel, equipment, research, and other tangible products" represent "something of value to the Clinton Campaign, and as such, constitutes an illegal in-kind contribution."⁹ In support of this position, the Complaint cites Matter Under Review 5366 which dealt, in part, with an illegal in-kind contribution of corporate staff time to a presidential campaign, and *United States v. Harber*, a criminal case involving the campaign manager of a congressional campaign who simultaneously created and directed a Super PAC that made over \$325,000 in coordinated communications opposing a rival candidate.¹⁰ Neither the Complaint's theory of what constitutes an in-kind contribution nor the support cited by the Complaint are dispositive.

In order to be considered an in-kind contribution to Hillary for America CTR's proposed communications, and necessary costs of production, must meet the Commission's definition of a coordinated communication under section 109.21.¹¹ CTR's proposed communications do not meet this standard. CTR has proposed to make communications via email, its own websites, and "free" social media channels (e.g., Facebook, Twitter, YouTube). Such communications are not "public communications." The term "public communication" includes "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."¹² The term "general public political advertising," in turn, does "not include communications over the Internet, except for communications placed for a fee on another person's Web site."¹³ The Commission has "narrowly interpreted the term Internet communication 'placed for a fee,' and has not construed that phrase to cover payments for services necessary to make an Internet communication."¹⁴ Because CTR's proposed communications would not be placed for a fee on another person's website, they are not "public communications." Finally, as Internet communications, CTR's proposed activities will not constitute an "electioneering communication" under section 100.29.¹⁵ Thus, because CTR's proposed communications are not "electioneering communications" or "public communications" they do not satisfy the content standard of section 109.21 and are therefore not a "coordinated communication."¹⁶

The Commission's Office of General Counsel has consistently recommended dismissal of complaints alleging that communications other than "public communications" sponsored by third

⁹ Complaint at 7, 5.

¹⁰ See *id.* at 7 (citing FEC Matter Under Review 5366 (Edwards for President/Tab Turner); E.D.V.A. 1:14-cr-00373, filed Nov. 6, 2014).

¹¹ 11 C.F.R. § 109.21.

¹² *Id.* § 100.26.

¹³ *Id.*

¹⁴ FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report at 6 (May 16, 2013).

¹⁵ 11 C.F.R. § 100.29(b).

¹⁶ *Id.* § 109.21(c).

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parties were illegal contributions.¹⁷ In Matter Under Review 6522, for example, the Office of General Counsel concluded that a corporate website that included express advocacy for the corporate owner's congressional campaign was not an illegal contribution because the communication was not a "public communication" and therefore could not be a "coordinated communication."¹⁸ In Matter Under Review 6722, the Office of General Counsel concluded that a House Majority PAC web video featuring candidates speaking directly to the camera was not a "coordinated communication," stating that "[b]ecause the video is neither an electioneering communication nor a public communication, it fails the content prong of the Commission's coordinated communications test and it cannot constitute an in-kind contribution."¹⁹ Additionally, in each of these cases the Commission has unanimously voted to dismiss the complaints as recommended by the Office of General Counsel. Thus, communications other than "public communications" sponsored by third parties have been consistently found to not be contributions, in-kind or otherwise. In the instant case, CTR's proposed communications are not "public communications" and therefore are not a contribution to Hillary for America, and as such, CTR's "personnel, equipment, research, and other tangible products" are not, as with the House Majority PAC's production expenses in Matter Under Review 6722, an in-kind contribution.

Finally, the Complaint claims that CTR will be subject to the \$2,700 per election contribution limit as a "hybrid PAC."²⁰ While CTR does not dispute that it is subject to this limit, there is similarly no evidence or facts presented in the Complaint to indicate that this limit has been exceeded. Thus, this line of argument can be dismissed outright as mere speculation.

II. CTR Is a "Carey PAC" That Plans to Make No Independent Expenditures

The Complaint also alleges that CTR is not a Super PAC and that it has accepted, or is planning to accept, illegal contributions.²¹ The Complaint argues that because CTR will coordinate some of its activity with Hillary for America, it is not a Super PAC but instead a traditional political committee subject to the individual donor limits and contribution limits to federal candidates.²² Accordingly, the Complaint alleges CTR will be in violation of the law if it accepts "soft money" into a non-contribution account.²³ Finally, the Complaint argues that even if CTR forms as a

¹⁷ FEC Matter Under Review 6477 (Right Turn USA), First General Counsel's Report (Dec. 27, 2011); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress), First General Counsel's Report (Feb. 5, 2013); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report (Sept. 17, 2013); FEC Matter Under Review 6722 (House Majority PAC), First General Counsel's Report (Aug. 6, 2013).

¹⁸ FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress), First General Counsel's Report (Feb. 5, 2013).

¹⁹ FEC Matter Under Review 6722 (House Majority PAC), First General Counsel's Report at 5 (Aug. 6, 2013).

²⁰ Complaint at 6.

²¹ *Id.* at 9.

²² *Id.*

²³ *Id.*

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“hybrid PAC,” it will quickly exceed the contribution limit under the in-kind contribution theory addressed above.²⁴

Again, it should first be noted that the Complaint is entirely speculative, even to the extent of having to guess what kind of committee CTR intends to file as. Additionally, the Complaint again alleges no facts to support its claim that CTR has accepted, or will accept, illegal contributions. As noted above, the Commission requires specific facts and has consistently rejected complaints “with nothing more than speculation and hearsay as the basis to investigate an allegedly contemplated violation.”²⁵

Moreover, the Complaint also mischaracterizes CTR. CTR has filed with the Commission not as an independent expenditure-only PAC but as a “Carey PAC.” Independent expenditure-only committees are not the only type of exempt political committee. Carey PACs may maintain one bank account—which is limited to “hard money” contributions of \$5,000 or less from federally permissible sources—to make contributions to candidates, and a second bank account, or “non-contribution account,” which may accept funds without limit to finance “independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives.”²⁶

Notably, unlike independent expenditure-only PACs, Carey PACs do not represent that they will sponsor independent expenditures, and Commission guidance makes clear that the non-contribution account may be used for advertisements that refer to federal candidates but that do not qualify as independent expenditures.²⁷ Carey PACs instead stipulate that they will establish a segregated account that will be used to finance activities other than making contributions to federal candidates or committees.²⁸ The Commission’s guidance notes that this account can be used to pay for “advertisements that refer to a Federal candidate and generic voter drives,” in addition to independent expenditures, as long as the advertisements or voter drives do not qualify as a contribution.²⁹

Thus, because CTR has not filed with the Commission as an independent expenditure-only PAC but instead has filed as a Carey PAC, the Complaint’s claims are simply incorrect. Under Commission-provided guidance, CTR can receive contributions that are exempt from the individual donor limits. CTR’s hard money account is still subject to the same limits as a traditional PAC, but there is nothing in the Complaint to suggest that these limits have been exceeded.

²⁴ *Id.*

²⁵ FEC Matter Under Review 5562 (Sinclair Broadcast Group), Statement of Reasons of Commissioners David M. Mason and Bradley A. Smith at n. 15 (July 12, 2005).

²⁶ Federal Election Commission, FEC Statement on Carey v. FEC Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

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III. CTR Has Not Made Any False Certification to the Commission

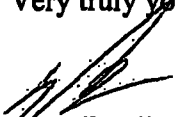
Finally, the Complaint alleges that CTR "intends to knowingly and willfully violate" its certification to the Commission by filing as a Super PAC that will falsely claim to be make only independent expenditures, or as a "hybrid PAC" that will make illegal in-kind contributions.³⁰

This allegation is again wholly speculative, baseless, and a misrepresentation of the law, as well as not reflecting CTR's filing as a Carey PAC. As explained in the previous sections, CTR's activities have a firm basis in the law and Commission precedent and guidance, and its filing with the Commission correctly states its proposed activities. The Complaint again presents no facts to support its allegation and fails to meet the Commission's "reason to believe" standard.

Conclusion

The Complaint fails to allege specific facts that constitute a violation of the Act or Commission regulations. For the reasons described herein, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,



Marc E. Elias
Ezra W. Reese
Colin Z. Allred
Counsel to Respondents

³⁰ Complaint at 10.



FEDERAL ELECTION COMMISSION

999 E Street, NW

Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
Please use one form for each Respondent/Client
FAX (202) 219-3923

MUR # 6940

NAME OF COUNSEL: Marc E. Elias, Ezra W. Reese, and Colin Z. Allred

FIRM: Perkins Cole, LLP

ADDRESS: 700 13th Street, N.W., Suite 600

Washington, DC 20005

TELEPHONE- OFFICE (202) 654-6200

FAX (202) 654-6211

The above-named individual and/or firm is hereby designated as my
counsel and is authorized to receive any notifications and other communications
from the Commission and to act on my behalf before the Commission.

6/29/15
Date

[Signature]
Respondent/Client Signature

Treasurer
Title

RESPONDENT/CLIENT:

MAILING

ADDRESS: Correct the Record and Elizabeth Cohen, Treasurer

455 Massachusetts Avenue, N.W. Suite 600, Washington, D.C. 20001

TELEPHONE- HOME () _____

BUSINESS () _____

Information is being sought as part of an investigation being conducted by the federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.